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**IN THE  
SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1945.**

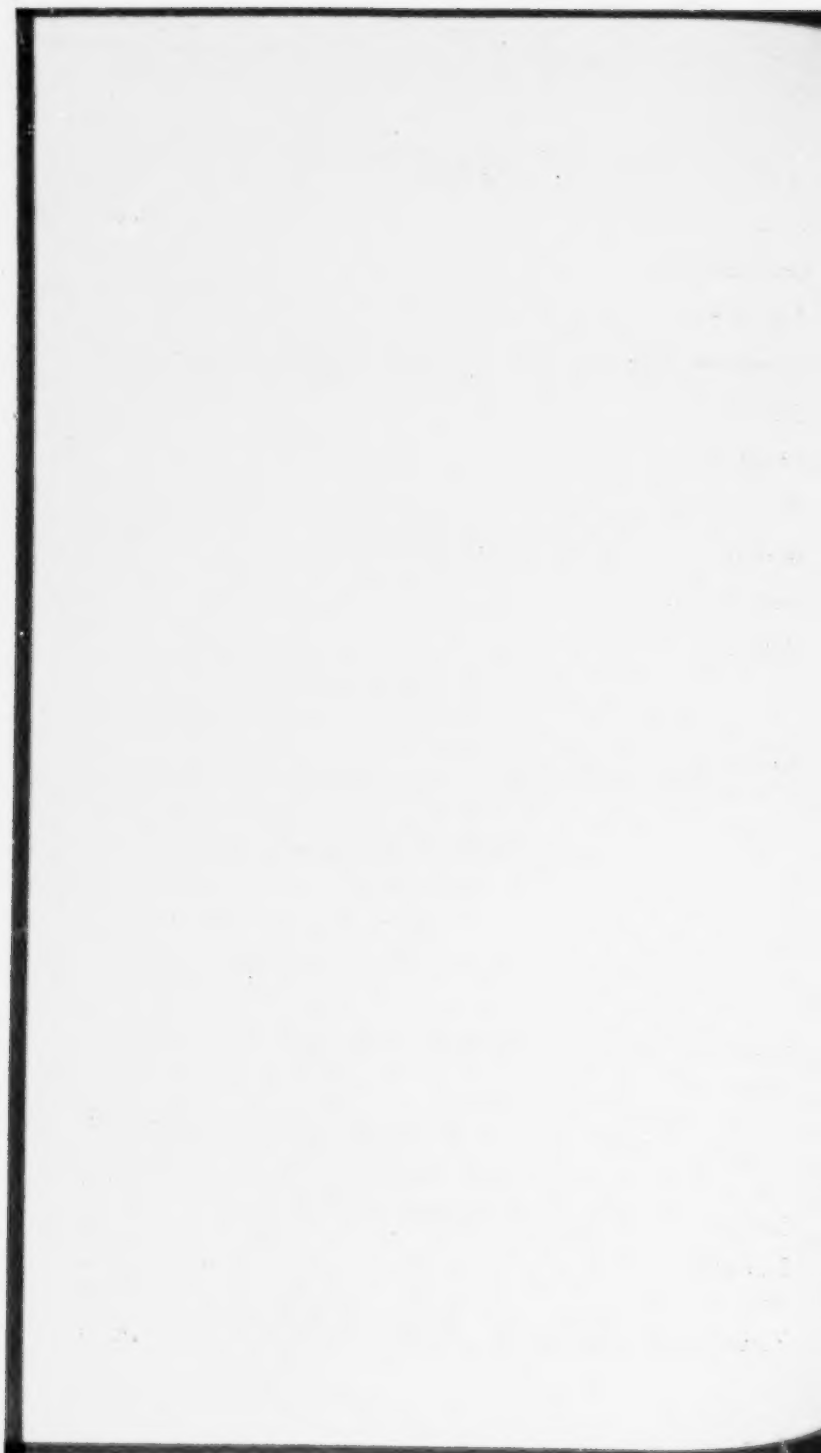
**No. ~~120~~ 121**

**MARIE COOPER DIECKHAUS,  
Petitioner,**

**vs.**

**TWENTIETH CENTURY-FOX FILM CORPORATION.**

**PETITION FOR A WRIT OF CERTIORARI  
To the United States Circuit Court of Appeals  
for the Eighth Circuit.**



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**To the United States Circuit Court of Appeals  
for the Eighth Circuit.**

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Marie Cooper Dieckhaus prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered in the above entitled cause on February 25, 1946. This judgment reverses, with directions to dismiss the case, the interlocutory decree of the District Court of the United States for the Eastern District of Missouri in favor of petitioner, awarding an accounting for damages and profits and an injunction against further exhibition of respondent's sound motion picture "Alexander's Ragtime Band," on petitioner's complaint that it infringed her common law copyright in the unpublished book "Love Girl." The suit was brought in the federal court because of diversity of citizenship and the amount involved.

### **OPINIONS BELOW.**

The findings of fact and conclusions of law of the trial judge have not been reported (R. 1639-53). The opinion of the District Court of the United States for the Eastern District of Missouri (R. 1429-43) is reported in *Dieckhaus v. Twentieth Century-Fox Film Corporation*, 54 F. Supp. 425 (1944). The opinion of the United States Circuit Court of Appeals for the Eighth Circuit (R. 2027-46) has not yet been reported.

### **JURISDICTION.**

The judgment of the Court of Appeals was entered on February 25, 1946; petition for rehearing was denied without opinion on March 25, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended, and Rule 38 (5) (b) of the Supreme Court of the United States. The bases upon which petitioner contends that this Court should issue the writ of certiorari are:

1. The decision of the court below raises the important question of whether, under the decision of *Erie R. Co. v. Tompkins*, 304 U. S. 64, in diversity cases, where the state law has not been announced, a federal court is free to ignore and disregard the uniform holdings of this Court and every other court which has passed upon the same matter.
2. The decision of the court below is untenable and, therefore, probably in conflict with the state law, as yet unannounced by the Supreme Court of Missouri. Cf. *Ruhlin v. N. Y. Life Ins. Co.*, 304 U. S. 202, 206. A federal court cannot presume that the state court will adopt a rule of law which is unsound in principle, at variance with

the decisions of other courts, and which places so heavy a burden of proof upon a plaintiff as to completely withdraw the protection afforded by common law copyright.

3. The court below has rendered a decision in conflict with the decisions of other circuit courts of appeals and of this Court on the same matters. The conflicts are not corollary to a permissible difference of opinion in the state courts and involve principles of law applicable to, and applied in, cases involving infringement of statutory, as well as common law, copyright.

4. The action of the court below in ignoring Rule 52 (a) of the Rules of Civil Procedure constitutes such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

### QUESTIONS PRESENTED.

1. Whether the federal courts, under the Rule in *Erie R. Co. v. Tompkins*, 304 U. S. 64, are free to ignore and disregard the uniform holdings of other courts, state and federal—including this Court, in the United States and England, on the same matter in a case where the state law has not been announced.

2. Whether, in a suit for common law copyright infringement, the fact of access by an infringer may be proved, as other facts, by circumstantial evidence despite denials of copying by defendant's witnesses and documents, such circumstantial evidence consisting of a showing that physical access was possible plus similarities between the two works so numerous and substantial as to prevent coincidence from being a satisfying explanation.

3. Whether, in a suit for common law copyright infringement, public domain constitutes a defense to the charge of literary piracy, if defendant fails to establish that the subject matter involved was taken from sources in the public domain and not from plaintiff's work.

4. Whether the court below disregarded Rule 52 (a) of the Rules of Civil Procedure in reversing the judgment of the trial court for what it termed "an error of law", but which was in substance the trial court's finding of the fact of access, which finding of fact was supported not merely by substantial evidence, but by the weight of the evidence, and was not clearly erroneous.

### STATEMENT.

The findings of fact of the trial court are set forth in the record at pages 1639 to 1653. This statement, containing the facts relevant to the issues presented at this time, is based thereon unless otherwise noted.

In 1934, plaintiff, a resident of St. Louis, Missouri, completed a new and original book, "Love Girl", which was designed to provide a vehicle for the introduction of numerous songs, about twenty-six in all, of her own composition. The musical career of Hubert T. Bauersachs, a concert violinist, teacher and composer, with whom plaintiff had studied, provided certain of the incidents about which plaintiff wrote (R. 88-91, 116-19).

She submitted the work to various persons for criticism. Dr. Raymond Allen Wieman went over portions of the manuscript in 1934; he read the entire book in 1936 (R. 77), as did William W. Phillips, a publisher (R. 82). Mrs. Mabel H. Malone, a fellow member of the St. Louis Writers Guild, read the book in 1934 or 1935 (R. 291) and suggested that it could be used as a vehicle for Irving Berlin's songs (R. 125). Plaintiff rejected this idea. Thereafter, in 1936, Mrs. Malone moved to Los Angeles, California, where she wrote and attempted to sell several motion picture scenarios and radio scripts (R. 1426).

After moving to California, Mrs. Malone recommended to plaintiff that she send her novel to Laurence D'Orsay, a literary agent and critic of Hollywood, California. Plaintiff, accordingly, mailed the manuscript to him on January 21, 1937; she did not receive it back until May 8, 1937. There were eight or nine persons on Mr. D'Orsay's staff, several of whom read manuscripts and wrote and sold stories (R. 335); all of them had access to the manuscripts, including plaintiff's, which were received at the office.

As a result of information received from Mr. D'Orsay

regarding the protection of literary property, plaintiff, on January 21, 1937, took a copy of her manuscript to the Post Office in St. Louis, where it was securely sealed, addressed to plaintiff at her St. Louis address and duly registered, the registration mark being January 21, 1937, the Registry Number 187121. The seal remained unbroken until the sealed copy was examined and opened on June 7, 1941, at the direction of the trial judge, by defendant's counsel, who made a photostatic copy thereof (54 F. Supp. 425, 426; R. 1430, 315, 1417-19).

Defendant Twentieth Century-Fox Film Corporation, during the latter part of 1936, began negotiating with Irving Berlin for the production of a motion picture featuring his music. Mr. Berlin agreed to the use of his songs but insisted that the story must be fictional and not a "life of Irving Berlin" (R. 408). He prepared a brief sketch of suggestions for such a story. Mr. Berlin is a song writer, not a novelist. Although considerable effort was made to prove that he was the author of the story, the testimony of defendant's witnesses indicates that his contribution to the picture consisted of his name and his songs (R. 1238, 1245, 1351, 1362, 1385). Thereafter defendant employed various screen writers, Richard Sherman, Sheridan Gibney, Lamar Trotti and Kathryn Scola, who for over a year worked on the story, writing eight different scripts in all. Defendant's final script was approved in January 1938; the picture was produced and first shown in St. Louis in August 1938.

All of defendant's witnesses, including the various writers (whose contracts contained warranties of originality and against infringement claims [R. 1348-49; 1299-1300; 1265]) denied copying plaintiff's manuscript. The writers claimed that the motion picture, with the exception of the musical numbers, resulted from original ideas of their own, without resort to any source material. Defendant's

files contained no entry showing receipt of plaintiff's manuscript at the studio.

The findings set forth the similarities between the book and the film, with page references to both of plaintiff's manuscripts, Exhibits Nos. 1 and 5, and to defendant's "Shooting Final", Exhibit N, the final script used in the picture (R. 1644-52).

### **PROCEEDINGS IN THE TRIAL COURT.**

A review of the procedural developments in this case is believed necessary to an understanding of the problems presented in this petition.

#### **(A) The Issues.**

Defendant tried the case in the District Court on the theory that it had not copied plaintiff's book, and that the similarities, if any, between the novel and the movie were not sufficient to constitute infringement. The trial occupied seven days in December, 1942, and January, 1943. The judge read plaintiff's book and viewed the defendant's picture. The case was then taken under advisement, the decision being announced and the opinion filed on March 4, 1944. *Dieckhaus v. Twentieth Century-Fox Film Corporation*, 54 F. Supp. 425 (R. 1429-43).

#### **(B) The Decision.**

The court decided that plaintiff was entitled to an injunction, enjoining and restraining defendant from infringing plaintiff's copyright, to payment for damages sustained by plaintiff, and to an accounting for gains and profits derived by defendant from its infringement. The trial judge held that access—like other issues of fact—could be proved by circumstantial evidence and rational inferences (54 F. Supp. 425, 427; R. 1431-32). After analyzing the evidence on this point, the court stated:

"The foregoing facts prove no more than that the manuscript was temporarily out of plaintiff's control and was in Hollywood, the same city in which defendant's employees carried on their endeavors. We certainly cannot infer from this alone that defendant's employees had access to plaintiff's novel for the purpose of copying it. However, we think the facts before the court are such as show that such access was not impossible and, therefore, lay the foundation to permit the ultimate fact of access to be inferred from similarities, if any appear, between the novel and the movie. See *Simonton v. Gordon*, D. C., 12 F. 2d 116; *Frankel v. Irwin*, D. C., 34 F. 2d 142; *Dam v. Kirk La Shelle Co.*, 2 Cir., 175 F. 902, 41 L. R. A., N. S., 1002, 20 Ann. Cas. 1173; *Wilkie v. Santly Bros.*, 2 Cir. 91 F. 2d 978."

The court proceeded to examine, and the opinion sets forth, the similarities between the novel and the movie: of character (54 F. Supp. 425, 428; R. 1434), plot, incident, episode, locale, and treatment (54 F. Supp. 425, 428-31; R. 1434-39). Referring to defendant's denial of copying and claim of originality, the court stated:

"Nevertheless, the similarities outlined above are too numerous and too glaring to be the result of coincidence.

"While the evidence before the court is such that we hesitate to point the accusing finger at any one of defendant's servants as being a conscious plagiarist, the appropriation of plaintiff's material, if any, may have been the result of a subconscious memory of one who read plaintiff's book, but that circumstance would not annul plaintiff's right to relief. See *Harold Lloyd Corporation v. Witwer*, 9 Cir., 65 F. 2d 1, loc. cit. 16. This is not a criminal case, and intent is not a necessary element of the cause of action. See *Meccano v. Wagner*, D. C., 234 F. 912; *Fisher, Inc., v. Dillingham*, D. C., 298 F. 145; *Sheldon v. Metro-Goldwyn Pictures Corp.*, supra. Nor are we satisfied with the further



explanation that much of the accused material is the stuff of common human experience and, therefore, cannot be said to be plaintiff's original creation. It is true that most fictional literature attempts to hold the mirror up to life; as Palladas remarked long ago, 'All life is a stage and a play' and anyone may draw on human experience and may simulate human experience by creating episodes which suggest reality. But the author's treatment is his own exclusive property and is protected by the courts. *Hartfield v. Peterson*, 2 Cir., 91 F. 2d 998; *Detective Comics v. Bruns Publications*, 2 Cir., 111 F. 2d 432, 433; *Wilkie v. Santly Bros.*, 2 Cir., 91 F. 2d 978, 979. We think this is a case where plaintiff's treatment has been consciously or unconsciously purloined."

. . . . .

"The court, in its role as the trier of fact, has read the novel and has seen the movie, in addition to having had the opportunity of examining the various scripts and conference minutes from the files of defendant motion picture company. Speaking from the standpoint of one who has seen the movie and read the book, we are of the opinion that the ordinary observer would take the movie to be a picturization or dramatization of plaintiff's novel, as evidenced by the portions described above. From this we infer that the defendants or their agents have copied plaintiff's work and have, therefore, had access to it."

(54 F. Supp. 425, 431-32; R. 1440-41.)

**(C) Defendant's Motion to Reopen.**

The entry of judgment was postponed, pending the filing by plaintiff of suggested findings of fact, conclusions of law, and a decree as requested by the court (54 F. Supp. 425, 433; R. 1443). These were delayed by repeated requests from defendant that it needed additional time to prepare counter-findings of fact. As consideration for the delay by plaintiff, defendant agreed to promptly take its

appeal so that the case could be heard at the Fall Term of 1944 (R. 1614-15). Instead of doing this, however, defendant, on June 28, 1944, filed a motion to reopen the case to permit defendant to adduce additional testimony which, defendant alleged, would prove that plaintiff had been guilty of fraud (R. 1443).

Defendant had employed the period since the trial court's decision was announced to institute a nationwide search, through private detectives, in an effort to establish a case of fraud. They interviewed the witnesses who testified at the trial and many others whose names had been mentioned in the course of the proceedings. The result of the investigation was presented to the court in affidavits filed with the motion to reopen. They were not shown—nor even claimed to be—based upon newly discovered evidence (R. 1960-61). Plaintiff submitted counter-affidavits (R. 1583-1609), but of course was unable to cross-examine defendant's affiants.

Plaintiff's authorship of her book was not questioned during the trial. It was established by documentary evidence and by oral testimony of unimpeached witnesses (R. 76, 81). Now, however, having lost in a defense based on the theory that there was no copying and (in the words of the trial judge) "there were no similarities" (R. 1627), defendant came into court with new counsel and sought the privilege of retrying the case on the theory that there had been copying but that plaintiff, not defendant, was the literary pirate. It charged that plaintiff had opened her sealed manuscript and had rewritten the book, thereafter resealing it.

The motion to reopen was argued orally on June 30, 1944, and thereafter briefs were submitted by the parties. On December 29, 1944, the motion was overruled (R. 1639); and, on the same day, the trial court filed its findings of fact (R. 1639-53), conclusions of law (R. 1653) and judgment (R. 1654-56).

**(D) Findings of Fact.**

As noted, the trial court made its findings after considering the evidence, arguments and briefs of counsel on the motion to reopen. It should, therefore, be noted in this connection that the trial judge found that plaintiff was the author of "Love Girl"; that the work was a new and original book (R. 1640, par. IV); and that the defendant, despite the denials and claims of originality by its witnesses, including the various writers (R. 1643, par. VIII), "used and copied substantial and material portions of the plot, the expressed ideas, dramatic situations, scenes, episodes, incidents, characters and treatment thereof contained in plaintiff's composition" (R. 1644, par. XI). The court saw no reason to modify that portion of its opinion which stated:

"On January 24, 1937, plaintiff mailed a copy of her manuscript to herself in a sealed package; the seals remained unbroken until the sealed copy was examined by counsel at the direction of this court. That Copy is before the court, marked 'Exhibit 5'." (54 F. Supp. 425, 426; R. 1430.)

**(E) Motion of Defendant to Amend Findings and for New Trial.**

Defendant renewed the charge of fraud, on January 8, 1945, in a request for findings of fact (R. 1737) and in a motion for a new trial (R. 1656).<sup>1</sup> In addition, defendant filed objections to the court's findings of fact and conclusions of law (R. 1811). To this motion plaintiff filed an answer or opposition (R. 1878). Additional affidavits were submitted by the parties.

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<sup>1</sup> Numerous newspaper clippings and other articles from all over the United States announcing the picture were filed with the motion for new trial in an effort to charge plaintiff with prior knowledge of the picture; but there was no evidence to show that plaintiff had seen any of such publications. Moreover, except for the August, 1938, issue of a magazine called "Screen Romances," none of the details of the story appeared in these Exhibits.

At the trial, defendant and its witnesses claimed complete originality for the entire story. In the motion for a new trial, however, defendant for the first time referred to Paul Whiteman's book "Jazz" as the source from which defendant might have obtained the material for the story of the picture.

On February 7, 1945, the court heard arguments on the various motions. On March 21, 1945, the various motions, including the motion for a new trial, were overruled (R. 1995). The court, on its own motion, amended paragraph VIII of its findings of fact wherein one of defendant's witnesses had been designated as president of the corporation instead of as vice-president thereof (R. 1996). An appeal followed to the United States Circuit Court of Appeals for the Eighth Circuit.

### **PROCEEDINGS IN THE COURT OF APPEALS.**

#### **(A) Issues Raised.**

On appeal, defendant-appellant continued to pursue the theme of fraud in an effort to create an unfavorable atmosphere and to prejudice plaintiff in the mind of the court. Its statement and argument intermingled matter contained in the affidavit (which had been offered with the motions to reopen and for a new trial) with evidence introduced at the trial. This perhaps made it difficult for the court below to determine what evidence had been before the trial judge when his decision was rendered and what material was offered thereafter.

#### **(B) Decision of the Court of Appeals.**

On February 25, 1946, a divided court reversed the judgment of the trial court with directions to dismiss the case. Judge Woodrough delivered the opinion of the court, in which Judge Sanborn concurred. Judge Johnsen dissented in part in a separate opinion.

The majority reviewed the testimony of defendant's producers, directors and writers, all of whom testified by depositions, noted their claims of originality, and denials of copying; and observed that "each individual testified with complete freedom, candor and frankness, without mental reservation. Collectively they are seen in the testimony to have been a hard working group, concentrating their energies upon their task of original composition and production" (R. 2035). They called attention to the fact that defendant's files contained no record showing the receipt of plaintiff's manuscript at the studio; and that Mrs. Malone and Mr. D'Orsay, to whom plaintiff had submitted her manuscript, had denied giving it to defendant. The majority then held that the trial court committed an "error of law" (R. 2043) in finding that defendant had access to plaintiff's book, which finding was based upon circumstantial evidence, including numerous and marked similarities which could not be explained by coincidence, in the face of such evidence of non-access. The two judges also observed that the similarities between the book and the film were all in the public domain (R. 2039-40).

As is pointed out subsequently in this petition, the majority did not attempt to distinguish—nor even cite—the apposite rulings of other circuit courts of appeals on the two points involved: (1) proof of access by circumstantial evidence; and (2) the condition precedent to the defense of public domain—proof that the similarities complained of, were taken from the public domain and not from plaintiff's work.

In his dissenting opinion, Judge Johnsen stated that "proof of access, like other legal facts, may competently rest on circumstantial evidence and rational inference from it," and that "substantial similarities are always competent evidence of both access and copying." The question involved "is merely as to the weight of the inference from the similarities, in comparison with the direct

evidence of non-access and non-copying." That question is for the trier of fact to determine, "unless the similarities are so insubstantial as rationally to be incapable of affording the basis for an inference." Since "the similarities here were such in number and character that coincidence was not on its face a natural and satisfying explanation for them"; since there was no "extraneous source shown as their common basis"; and since "all possibility of access was not excluded by the physical facts under the tests of general knowledge and experience," Judge Johnsen declared that "the numerous and substantial similarities could properly be used to infer access as a general legal fact," just as the trial court had done in this case (R. 2044-45).

Judge Johnsen expressed the opinion that the case should be remanded for trial on the issue of possible fraud, and that, if the trial judge should determine, after a hearing, that the charge was without foundation, he could reenter his previous judgment (R. 2046).

**(C) Motion for Rehearing.**

On March 11, 1946, plaintiff-appellee filed a petition for rehearing, in which she invited the fullest possible exploration of the charge of fraud. This was denied, without opinion, on March 25, 1946 (R. 2067).

### **SPECIFICATION OF ERRORS TO BE URGED.**

The court below erred:

1. In failing to follow Rule 52 (a) of the Rules of Civil Procedure and in substituting its own views regarding the weight of the evidence and the credibility of witnesses for those of the trial court, in reversing the latter's findings of access and copying.
2. In holding that access could not be proved by circumstantial evidence in the face of denials of access by defendant's witnesses and documents.
3. In finding that defendant's witnesses were not impeached.
4. In ignoring the fact that plaintiff's witnesses were not impeached.
5. In holding that the trial court made its determination against defendant on the doctrine of unconscious plagiarism when the trial court made an express finding of copying and added that plaintiff would nevertheless be entitled to relief, even if the copying were unconscious.
6. In holding that in no suit for infringement of common law copyright had access been proved by circumstantial evidence.
7. In believing that it was following the decisions of the Circuit Court of Appeals for the Second Circuit whose judges (the majority observed) have "had most to do with declaring the law on the subject," when the decisions of the Second Circuit on the matters involved are squarely contra.
8. In misconceiving the contribution of Irving Berlin to



the story of the motion picture and in substituting its own finding, which was contrary to the testimony of defendant's own witnesses, for that of the trial judge.

9. In holding that the similarities were all in the public domain.

10. In holding that public domain was a defense to a charge of infringement in the absence of a showing by defendant that the similarities were taken from the public domain rather than from plaintiff's book and in the absence of any such contention by the defendant at the trial.

11. In failing to apply the law of Missouri, as required by *Erie R. Co. v. Tompkins*, 304 U. S. 64.

12. In ignoring and disregarding the uniform decisions of other courts, state and federal—including this Court, in the United States and England, on the same matter, the state law not yet having been announced.

13. In presuming that the Supreme Court of Missouri, in declaring the common law of literary property, would adopt a rule which is unsound in principle, at variance with the decisions of other courts, and which places so heavy a burden of proof upon a plaintiff as to completely withdraw the protection afforded by common law copyright.

14. In failing to affirm the judgment of the trial court.



## REASONS FOR GRANTING THE WRIT.

1. The decision of the court below raises an important question in the application of the rule of *Erie R. Co. v. Tompkins*, 304 U. S. 64, which should be resolved by this Court.

Petitioner's suit for infringement of her common law copyright was brought in the District Court because of diversity of citizenship and the amount involved. The Missouri law should have been applied. It is submitted that the Court of Appeals failed to apply the Missouri law to the questions which it should control and instead has applied legal concepts which no court anywhere, so far as we have found, has ever adopted.

Missouri courts had declared the Missouri law to be that an author was entitled at common law to protection of his literary property against appropriation; and they had indicated that, in formulating the law of the state, they would select well reasoned and convincing decisions of other courts, federal and state, as a guide (*Kurfiss v. Cowherd*, 233 Mo. App. 397, 121 S. W. [2] 282; *Brunner v. Stix, Baer & Fuller Co.*, 352 Mo. 1225, 181 S. W. [2] 643). That was conceded by the defendant in this case. However, the Missouri courts have not declared what the Missouri law is in suits for appropriation of literary property with respect to: (1) whether the fact of access can be proved by circumstantial evidence in the face of sworn denials of copying by defendant's witnesses; or (2) whether the defense of use of sources in the public domain is available to a defendant who has failed to show that he had in fact taken the infringing material from sources in the public domain, rather than from the plaintiff.

The law which the Court of Appeals here applied with respect to the two points was not the law of Missouri, nor

the law of any other jurisdiction. It is in conflict with the decisions of other courts, state and federal, including this Court, in this country and in England. The decisions which the Court of Appeals here has, in effect, held, are either (1) erroneous or (2) would not be followed by the courts of Missouri, even though correct, are the following:

A. That the fact of access may be proved by circumstantial evidence, including inferences from unexplained similarities, in the face of direct evidence to the contrary by the defendant, in cases involving charges of infringement of common law copyright (*De Acosta v. Brown*, 146 F. [2] 408 [C. C. A. 2]; *Wilkie v. Santly Bros.*, 91 F. [2] 978 [C. C. A. 2]; *O'Neill v. General Film Co.*, 152 N. Y. S. 599, 157 N. Y. S. 1028, 171 App. Div. 854), as well as statutory copyright<sup>2</sup> (*Twentieth Century-Fox Film Corp. v. Stonesifer*, 140 F. [2] 579 [C. C. A. 9]; *Edwards v. Boorman*, 15 F. [2] 35 [C. C. A. 7]; *Arnstein v. Cole Porter* [C. C. A. 2], decided February 11, 1946; *Heim v. Universal Pictures Co., Inc.* [C. C. A. 2], decided February 16, 1946; *General Drafting Co. v. Andrews*, 37 F. [2] 54 [C. C. A. 2]; *Corelli v. Gray*, 29 T. L. R. 570, 30 T. L. R. 116); and

B. That public domain is no defense to a suit for infringement unless the defendant shows that he has resorted to sources in the public domain instead of to plaintiff's work, in cases involving charges of infringement of common law copyright (*De Acosta v. Brown*, *Wilkie v. Santly Bros.*, *O'Neill v. General Film Co.*, *supra*), as well as statutory copyright<sup>2</sup> (*Callaghan v. Myers*, 128 U. S. 617, 660; *Twentieth Century-Fox Film Corp. v. Stonesifer*, *supra*; *Hartfield v. Peterson*, 91 F. [2] 998, 1000 [C. C. A. 2]; *General Drafting Co. v. Andrews*, *supra*; *Fisher v. Dillingham*, 298 F. 145).

<sup>2</sup> On these issues, there is no basis for a distinction between cases involving common law and statutory copyrights. See page 28, *infra*.

Because of the aforementioned decisions and the convincing reasons contained therein, the trial judge, whose entire career, as a judge and as a practicing attorney, has been spent in the State of Missouri, concluded that the Missouri decisions would be in accord; his opinion cites several of the foregoing cases. Neither of the judges who composed the majority of the court below ever practiced in Missouri. The majority opinion in the court below, in reaching a contrary result, does not cite these decisions (except *Edwards v. Boorman*, *supra*, which is referred to in another connection), attempt to distinguish the rulings, nor indicate considerations which rendered them inapplicable. No local statutes, decisions, or special circumstances were noted which might, or could reasonably be anticipated to, divert the courts of Missouri from the well settled principles.

The federal courts will often have to apply the law of the state, under the rule of *Erie R. Co. v. Tompkins*, in advance of a determination of that law by the state courts. In that situation, it by no means follows that the federal court is free to disregard the decisions of other jurisdictions when the question is one of common law, in the absence of special or local considerations which would justify a departure from the general trend of the decisions.<sup>3</sup> The court cannot, simply because the state court has not yet spoken, declare the state law to be something which is neither supported by principle nor by the rulings of other jurisdictions. To determine that the Missouri courts would declare an opposite view, in the face of such decisions, could only be justified if the rulings could not be supported in principle. The fact that

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<sup>3</sup> This case does not concern the interpretation of a state statute where, perhaps, decisions of other jurisdictions may not be pertinent (*MacGregor v. State Mutual Life Assurance Co.*, 315 U. S. 281). Moreover, unlike the situation in *Helvering v. Stuart*, 317 U. S. 154, 164, this is not a case where, of the decision of the court below, "one cannot say that it would be an arbitrary or unreasonable or even an unlikely holding on the part of the courts" of the state.

the Missouri courts have not yet spoken does not give the federal courts the right to ignore the law as established elsewhere and to impose its own concept as the law of Missouri, particularly when that concept operates in substance to destroy the protection which has always heretofore been given literary property by the common law.

What the court below has done must be regarded as unflattering either to the courts of other jurisdictions, all of which must have gone astray, or else to the courts of Missouri, which the court below must have regarded as not sufficiently intelligent to follow the correct and well-established rule. What the court has done is, in effect, to nullify the doctrine enunciated by this Court in *Erie R. Co. v. Tompkins*<sup>4</sup> and to refuse to follow what must be considered to be the law of Missouri. Petitioner submits that this Court should issue its writ of certiorari so that the principles applicable to the situation here, which will often recur, may be announced for the guidance of the federal courts.

2. As previously noted, the courts of Missouri have not decided the important questions presented herein. If faced with such problems, it may be assumed that they would select the best reasoned and most convincing authorities as a guide in formulating the Missouri law. (*Kurfiss v. Cowherd*, 233 Mo. App. 397, 121 S. W. [2] 282.) The decisions of other courts in the United States and in England, state and federal—including this Court—are in conflict with the holding of the court below. Accordingly, petitioner submits that the decision of the court below is

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<sup>4</sup> It seems to us clear that this case is governed by the rule in *Erie R. Co. v. Tompkins*. *Guaranty Trust Co. v. York*, 326 U. S. 99; *Cities Serv. Oil Co. v. Dunlap*, 308 U. S. 208; *Palmer v. Hoffman*, 318 U. S. 109; *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U. S. 487. If this were not true, however, the square conflict between the decision of the court below and those of other courts of appeals, noted herein and discussed under paragraphs 3 and 4 of the Reasons, *infra*, would involve matters of federal law. The need for uniformity would then be even more pressing.

untenable "and therefore, probably in conflict with the state law, as yet unannounced by the highest court of the State" (*Ruhlin v. New York Life Insurance Co.*, 304 U. S. 202, 206; *Lyon v. Mutual Benefit Health & Accident Ass'n*, 305 U. S. 484).

In the *Ruhlin*, case, this Court stated that conflict alone might not be a sufficient reason for the issuance of the writ of certiorari if the conflict is "merely corollary to a permissible difference of opinion in the state courts" (at page 206). Here, however, no local considerations were present and none were relied upon by the court below in departing from the uniform holdings of other courts. Petitioner submits that it was not the intention of this Court, by the principle stated in the *Ruhlin* case, to constitute federal courts as the instrument for the establishment in the first instance of divergence of opinion among the circuits, at least in the absence of pressing considerations of a local character. Moreover, here, unlike the situation in that case, a decision by this Court could reconcile the conflict of the circuits which the decision below has created.

There are other reasons, as well, why the proviso announced in the *Ruhlin* case is not applicable. Literary property cases tend almost exclusively to the federal courts. Unlike the insurance field, jurisdictional amount is rarely a bar. Moreover, the geographical concentration of the film and publishing industries provides diversity of citizenship between the parties as a rule. This Court has been realistic in weighing such factors in connection with the issuance of its writ of certiorari. (*Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U. S. 47; *Mackay Radio & Tele. Co., Inc. v. Radio Corp. of Am.*, 306 U. S. 86.)

Literary endeavor is a subject of national concern. As indicated in the paragraphs which follow, the decision of the court below withdraws, as a practical matter, the protection given to authors of literary material and will en-

courage plagiarists in the belief that the consequences of piracy can be averted by positive sworn denials, if they are sufficiently discreet in their thefts. This Court has called attention to the fact that, in copyright cases, "the ineffectiveness of the remedy" encourages "willful and deliberate infringement" (*Douglas v. Cunningham*, 294 U. S. 207, 209). Unless reversed, the decision of the court below, by saddling the plaintiff with too heavy a burden of proof (see page 23, *infra*), will destroy the protection heretofore afforded by common law copyright and recognized by the Missouri decisions. (*Kurfiss v. Cowherd*, *Brunner v. Stix, Baer & Fuller Co.*, *supra*). It will encourage piracy and discourage authorship to a marked degree. Moreover, the doctrines involved herein—proof of access by circumstantial evidence and the defense of public domain—are applied by the courts interchangeably in statutory and common law copyright infringement cases. (See *Arnstein v. Cole Porter*, *Wilkie v. Santly Bros.*, *De Acosta v. Brown*, *Twentieth Century-Fox Film Corp. v. Stonesifer*, *supra*.) The ruling of the court below, therefore, affects the scope of protection afforded by statutory, as well as by common law, copyright.

3. In holding that, as a matter of law, access cannot be proved by circumstantial evidence in the face of direct evidence of witnesses and documents of the defendant, the court below has rendered a decision which is in conflict with the uniform rulings of other circuit courts of appeals in cases involving charges of infringement of common law (*Wilkie v. Santly Bros.*, 91 F. [2] 978 [C. C. A. 2]; *De Acosta v. Brown*, 146 F. [2] 408 [C. C. A. 2]; *O'Neill v. General Film Co.*, 152 N. Y. S. 599, 157 N. Y. S. 1028, 171 App. Div. 854) as well as statutory copyright (*Twentieth Century-Fox Film Corp. v. Stonesifer*, 140 F. [2] 579 [C. C. A. 9]; *Edwards v. Boorman*, 15 F. [2] 35 [C. C. A. 7]; *General Drafting Co. v. Andrews*, 37 F. [2] 54 [C. C.

A. 2]; *Arnstein v. Cole Porter* [C. C. A. 2], decided February 11, 1946; *Heirn v. Universal Pictures Co., Inc.* [C. C. A. 2], decided February 16, 1946; *Corelli v. Gray*, 29 T. L. R. 570, 30 T. L. R. 116). The conflict is not corollary to a permissible difference of opinion in the state courts and should be resolved by this Court.

The reason for the holdings in the aforementioned cases is readily apparent. The history of litigation in this field provides convincing proof that literary thieves are never caught in the act. Nor do they rush to the witness stand to confess their thefts. The defendant starts with an obvious advantage. The direct evidence relating to access is always available to the defendant whose writers have used the material claimed to have been pirated. Publishers, producers, and motion picture companies frequently protect themselves, as in this case, by contracts requiring the writer to indemnify the company against infringement. When the issue of infringement arises, the writer has a direct and acute interest, both financial and professional, in contending that his work was original.

Access must, therefore, be proved by circumstantial evidence, by a showing, first, that the possibility of physical access existed, and, second, that the similarities are such that coincidence is not a satisfying explanation. Otherwise, discreet thefts followed by positive denials of copying would spell immunity for the plagiarist.<sup>5</sup> Considera-

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<sup>5</sup> In *Corelli v. Gray*, 29 T. L. R. 570, 30 T. L. R. 116, defendant's dramatic sketch was claimed to infringe plaintiff's novel. In the face of a defense of independent creation and a denial of copying, plaintiff's case was "entirely founded on coincidences or similarities between the novel and the sketch." In finding for plaintiff, Mr. Justice Sargant said:

"But nevertheless no one doubts that identity or extreme similarity between two musical or literary passages, even of quite moderate length, may be practically conclusive evidence in favour of common origin and against independent creation. In my judgment the similarities and coincidences in this case are such as, when taken in combination, to be utterly inexplicable as a result of mere chance coincidence" (at page 571).

In this case, too, the trial court found the similarities in incident, character and treatment "too numerous and glaring to be the result of coincidence."



tions such as these impelled the Seventh Circuit, in **Edwards v. Boorman**, *supra*, to say:

“Appellee’s position, however, is that having explicitly denied that they copied appellant’s production, and having sworn positively that they got their ideas from other sources, and no one having sworn to the contrary, the court was bound to find no copying and therefore no infringement. The cases are numerous where such situations have arisen and the same claim has been made without avail” (15 F. [2] 35, 36-37).

The case of **Stonesifer v. Twentieth Century-Fox Film Corp.**, 48 F. Supp. 196, 140 F. (2) 579 (C. C. A. 9), which involves the same defendant and several of the same witnesses involved in this suit, illustrates the efficacy of the doctrine. Defendant has given Kathryn Scola screen credit for writing the screen play, “Alexander’s Ragtime Band” (R. 1308). In the *Stonesifer* case, too, Kathryn Scola was a principal writer of the story. In that case, as in this, the records of Twentieth Century-Fox showed no receipt of the play in California. Darryl Zanuck testified there, as he did here, that the idea came from another source. Kathryn Scola testified there, as she did here, that the story was original. However, despite sworn denials and in large part because of similarities which the trial court concluded could not be dismissed as mere coincidence, the defendant was found guilty of plagiarism and literary theft. To render the decision in the *Stonesifer* case, the court was required to, and did, disbelieve the sworn testimony of defendant’s writers and producers, who denied access and copying vigorously and unequivocally.



Although the court below commented on the fact that the Eighth Circuit had not previously "had occasion to declare the law in cases involving plagiarism" (R. 2041), the opinion does not cite nor attempt to distinguish any of the aforementioned cases on this point.<sup>6</sup> Portions of the opinion suggest that the majority may have believed that the rule—permitting proof of access by circumstantial evidence, including inferences from unexplained similarities—was confined to cases involving infringement of statutory (as opposed to common law) copyright. Thus, the court below states:

"Our search of the authorities has convinced us it has never been and may not be applied in such a case as the present. The only cases we find in which it has been applied are cases in which access has been established actually or in consequence of copyright registration" (R. 2037).

There are also indications in the opinion that the court below thought its decision was in accord with the holdings of the Second Circuit [whose judges, the court noted, have "had most to do with declaring the law on the subject" (R. 2041)]. Both assumptions, if we read the opinion correctly, were unfounded. Not only does the reason for the rule require its application in cases involving infringement of common law copyright, but the Second Circuit has in fact so applied it (*Wilkie v. Santly Bros.*, 91

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<sup>6</sup> The court below does cite *Edwards v. Boorman* in connection with the "doctrine of unconscious plagiarism" upon which, it states, "the district court made its determination" (R. 2037). It is submitted that a study of the opinion of the trial court will disclose that the decree was not based on this doctrine. Instead the trial judge made an express finding of copying (R. 1440). He merely added that even if the copying had been subconscious, that circumstance would not annul plaintiff's right to relief.

F. [2] 978; *De Acosta v. Brown*, 146 F. [2] 408; see also *Arnstein v. Cole Porter*, *supra*.<sup>7</sup>)

In the *Wilkie* case, the court expressly found that plaintiff's musical composition had never been copyrighted. Defendant denied access and copying; and there was no direct evidence of access (13 F. Supp. 136). Nevertheless, since the evidence had not excluded the possibility of access, the trial court entered and the Court of Appeals affirmed a judgment against the defendant for infringement, the latter stating:

"But the charge of infringement does not fail merely because the infringer is not caught in the act, for access may be inferred or found circumstantially from the plan, the arrangement and the combination of the materials contained in the composition. *Edwards & Deutsch Lithographing Co. v. Boorman*, 15 F. (2) 35 (C. C. A. 7), certiorari denied 273 U. S. 738, 47 S. Ct. 247, 71 L. Ed. 867. \* \* \* Internal proof of access may rest in an identity of words or in the parallel character of incidents or in a striking similarity which passes the bounds of mere accident. *General Drafting Co. v. Andrews*, 37 F. (2) 54 (C. C. A. 2); *W. H. Anderson Co. v. Baldwin Law Pub. Co.*, 27

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<sup>7</sup> The decisions of the Second Circuit cited in the opinion (*R. 2041*) do not support the position of the court below. *Sarkadi v. Wiman*, 135 F. (2) 1002; *Darrell v. Morris*, 113 F. (2) 80, and *McConnor v. Kaufman*, 139 F. (2) 116, hold that, under Rule 52(a), the trial court's finding of the fact of access must be affirmed on appeal unless clearly erroneous. See *Arnstein v. Cole Porter*, *supra*.

In *Dellar v. Goldwyn*, 104 F. (2) 661, the court held that the trial court erred in rendering judgment for the defendant on a motion to dismiss, based solely on a comparison of plaintiff's play and a cutting continuity of the defendant's motion picture, in the absence of the showing that the cutting continuity faithfully represented the film. What the Court meant by its statement that disposing of a plagiarism suit summarily simply on comparison between a book and a play would be regrettable because such comparison could not dispose of a case unless against the plaintiff was this: even though similarities were evident, defendant might still be able to show at trial that he had taken them from the public domain and not from the plaintiff, or that the plaintiff had copied from him. The defendant was entitled to his day in court on those issues. The subsequent finding of the trial court that the cutting continuity did accurately represent the film was affirmed. *Dellar v. Goldwyn*, 150 F. (2) 612.

F. (2) 82 (C. C. A. 6); *Simonton v. Gordon*, 12 F. (2) 116 (D. C., S. D., N. Y.)" (at page 979).

Similarly, in *DeAcosta v. Brown*, the Second Circuit affirmed a judgment of infringement in a case of common law copyright where access had to be inferred from circumstantial evidence in the face of sworn denials. The manuscript plagiarized there was an unpublished screen play. The court deals with the problems presented by common law copyright by applying the principles with regard to infringement developed in statutory copyright cases. That the Second Circuit makes no distinction with respect to its approach to the problem is made evident by its rulings within the past few months. Thus, in *Arnstein v. Cole Porter*, in a decision rendered on February 11, 1946, the court cited the *Wilkie* case with approval and expressly noted the character of the circumstantial evidence adduced in that case by the plaintiff on the issue of access. With respect to the proof of copying required in an infringement suit, the court stated:

"As to the first—copying—the evidence may consist (a) of defendant's admission that he copied or (b) of circumstantial evidence—usually evidence of access—from which the trier of facts may reasonably infer copying. Of course, if there are no similarities, no amount of evidence of access will suffice to prove copying. If there is evidence of access and similarities exist, then the trier of the facts must determine whether the similarities are sufficient to prove copying."

. . . . .

"But a case could occur in which the similarities are so striking that we would reverse a finding of no access, despite weak evidence of access (or no evidence thereof other than the similarities); and similarly as to a finding of no illicit appropriation."

And, in **Heim v. Universal Pictures, Inc.**, on February 16, 1946, the same court observed that:

“In an appropriate case, copying might be demonstrated, with no proof or weak proof of access, by showing that a single brief phrase, contained in both pieces, was so idiosyncratic in its treatment as to preclude coincidence.”

In the case at bar, the similarities, set forth in the findings of fact (R. 1644-52) were found by the trial judge to be “too numerous and too glaring to be the result of coincidence” (R. 1440-41).

Whether the literary property involved is the subject of a common law copyright, as in the Wilkie and DeAcosta cases, and here, or of a statutory copyright, the issues of access and copying are still issues of fact, requiring proof that defendant used and pirated plaintiff's literary composition. It is, of course, true that a statutory copyright implies the existence of the manuscript outside of the possession of the plaintiff, and, therefore, the possibility of access. But, in a common law literary property case, there may also be evidence, as there was in the Wilkie and DeAcosta cases, and here, of the existence of the manuscript outside of the possession of the plaintiff, so as to give rise equally to the possibility of access.

The question resolves itself into the simple proposition that, in literary property cases, plaintiff must adduce evidence of copying; and that such evidence, as in all other fields of law, may be direct or circumstantial. Circumstantial evidence is not an inferior type of evidence. It may be more persuasive than the testimony of interested witnesses. Nor is there any reason for giving such evidence different treatment in copyright cases than in other cases. Its weight is for the trier of facts to determine, subject to review under the requirements of Rule 52 (a)

of the Rules of Civil Procedure. The contrary holding of the court below is in conflict with the decisions cited above and should be reviewed by this Court.

4. In holding that public domain is a defense to the charge of infringement, in the absence of an affirmative showing by the defendant that the similarities complained of were taken from sources in the public domain and not from plaintiff's work, the court below rendered a decision which is in conflict with a decision of this Court and with the uniform rulings of other circuit courts of appeals on the same matter. The conflict is not corollary to a permissible difference of opinion in the state courts and should be resolved by this court.

The rule is well settled that public domain is no defense to a suit for infringement unless the defendant shows that it has resorted to sources in the public domain instead of to plaintiff's work (*Callaghan v. Myers*, 128 U. S. 617, 660; *DeAcosta v. Brown*; *Wilkie v. Santly Bros.*; *O'Neill v. General Film Co.*, *supra*; *Hartfield v. Peterson*, 91 F. [2] 998, 1000 [C. C. A. 2]; *Twentieth Century-Fox Film Corp. v. Stonesifer*, *supra*; *Fisher v. Dillingham*, 298 F. 145). "Although common sources are open to all, a composer who arrives independently at his composition is entitled to protection against one who copies his work and not the earlier source" (*Wilkie v. Santly Bros.*, *supra*, at page 979). As stated by Judge Learned Hand:

"Any subsequent person is, of course, free to use all works in the public domain as sources for his compositions. No later work, though original, can take that from him. But there is no reason in justice or law why he should not be compelled to resort to the earlier works themselves, or why he should be free to use the composition of another, who himself has not borrowed. If he claims the rights of the public, let

him use them; he picks the brains of the copyright owner as much, whether his original composition be old or new" (Fisher v. Dillingham, *supra*, at page 150).

In this case, at the trial, defendant's witnesses vigorously asserted that the material complained of as being pirated from plaintiff's work was in fact original with them and was the product of their own conception.<sup>8</sup> The trial judge noted in the findings of fact with regard to the testimony of defendant's writers: "All claimed that the motion picture, with the exception of the musical numbers, resulted from original ideas of their own, without resort to any other material as the source for said picture" (R. 1643, par. VIII). This amounted to a denial of copying; but it is inconsistent with a claim that the similarities were taken by defendant from sources in the public domain. The court below cannot judicially notice what both parties deny. Nor does the Berlin outline amount to such a source. It does not contain the numerous detailed similarities complained of by plaintiff (R. 1644-52); and the trial judge so found. Moreover, as previously noted, the testimony of defendant's witnesses was in conflict with respect to its use in connection with the preparation of the final script.

That the record contained insufficient evidence upon which to base a defense of public domain was recognized by the defendant. In the motion for a new trial, it introduced Paul Whiteman's book "Jazz" as a source from which it might have obtained the material for the story of the picture. However, there was no showing that defendant's writers had used this book to procure the similarities complained of; in fact, their claim of originality at the trial would have been inconsistent with such a showing.

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<sup>8</sup> See for one example of this, Mr. Zanuck's testimony (R. 390) that the story was born "right in that office" and that "every movement of the story had its creation in that office."

The court below does not cite or attempt to distinguish any of the decisions referred to above. In support of its ruling the court below cites only the case of *Sheldon v. Metro-Goldwyn-Mayer*, 81 F. (2) 49, which does not support the court's opinion and contains nothing inconsistent with the authorities cited above.

It is interesting to note that, in the *Stonesifer* case, this defendant contended that all of the material used was in the public domain. The plaintiff's play had related to a certain hotel for women, which defendant's writer, Kathryn Scola, visited before writing the scenario. In that case, however, the court nevertheless found infringement because the detailed similarities convinced it that the defendant had taken them from the plaintiff's play rather than from the sources in the public domain where they might have been equally available.

Common sources are open to all, but it is beyond dispute that an author is entitled to protection against one who chooses to copy from him instead of going to the original sources. The contrary holding of the court below is in conflict with the decisions cited above and should be reviewed by this court.

5. The court below held that the decree of the trial court for the plaintiff was based upon an "error of law" and must be reversed (R. 2043). In substance, the error referred to was the trial judge's finding of access. Petitioner submits with deference that the court below—as the majority opinion shows on its face and as Judge Johnsen's dissent makes clear—has invaded the province of the trier of fact, by substituting its own views regarding the credibility of witnesses and the weight of the evidence for those of the trial judge, whose findings were based upon substantial evidence in the record. The procedure adopted in this instance, of denominating such finding "an error of law" and setting it aside accordingly, com-



pletely nullifies the division of function between trial and appellate courts which has been established by Rule 52 (a) of the Rules of Civil Procedure. This unwarranted departure from the accepted and usual course of judicial review and its serious consequences calls for an exercise of this Court's power of supervision.

The law is settled that, in proceedings for copyright infringement, access is an issue of fact (*Arnstein v. Cole Porter* [C. C. A. 2], decided February 11, 1946; *Sarkadi v. Wiman*, 135 F. 2d 1002 [C. C. A. 2]; *Darrell v. Joe Morris Music Co.*, 113 F. 2d 80 [C. C. A. 2]; *Arnstein v. Marks Music Corp.*, 82 F. 2d 275 [C. C. A. 2]; *Corelli v. Gray*, 29 T. L. R. 570) and that the conclusions of the trier of the facts thereon binds the appellate court provided there is evidence in the record to support the finding, "regardless of whether we would ourselves have reached the same conclusions" (*Arnstein v. Cole Porter*, *supra*). As the Second Circuit said in the aforementioned case:

"In copyright infringement cases cited by defendant, we have sustained judgments in favor of defendants based on findings of fact made by trial judges after trials, findings we held not to be 'clearly erroneous.' There we did not attempt to pass on the veracity or credibility of witnesses. To do so here would be to convert an appellate court into a trial court. \* \* \* ours must be a limited function. This is not, and must not be, a trial court. Such a court has a duty more difficult and important than ours. We begin our task where it leaves off."

In this case, at the trial, a voluminous body of evidence was presented by both plaintiff and defendant. The trial court had before it evidence indicating that, during the period that defendant's movie script was in process of preparation at its studio, plaintiff's book was in Hollywood, in the hands of a literary agent and critic, whose



staff had access to it; and that another critic, to whom the book previously had been submitted, and who, according to plaintiff, had suggested that it could be used as a vehicle for Irving Berlin's songs, was then also located in Hollywood. He had before him the oral testimony of authorship of plaintiff's work by disinterested and unimpeached witnesses. The judge considered the denials of copying by defendant's witnesses and their claims of originality for their writing (R. 1643). He read the book and saw the picture and noted the substantial character of the similarities. No extraneous source was shown nor claimed as their common basis. After carefully weighing the evidence he concluded that the similarities were "too numerous and too glaring to be the result of coincidence," and held that defendant had copied plaintiff's book. His conclusion that access could be proved by circumstantial evidence, including the inference from unexplained similarities, was, as noted, by Judge Johnsen, based upon a correct view of the law.

Wilkie v. Santly Bros. 91 F. (2d) 978 (C. C. A. 2);  
DeAcosta v. Brown, 146 F. (2d) 408 (C. C. A. 2);  
Twentieth Century-Fox Film Corp. v. Stonesifer,  
140 F. (2) 579 (C. C. A. 9);

Edwards v. Boorman, 15 F. (2) 35 (C. C. A. 7);  
Arnstein v. Cole Porter (C. C. A. 2), decided February  
11, 1946;

Heim v. Universal Pictures Co., Inc. (C. C. A. 2),  
decided February 16, 1946;

O'Neill v. General Film Co., 152 N. Y. S. 599, 157  
N. Y. S. 1028, 171 App. Div. 854;

Corelli v. Gray, 29 T. L. R. 570, 30 T. L. R. 116.

The court below does not state that the finding of the trial judge on the issue of access was clearly erroneous. On the record, it could not have done so. Of the four judges who have heard the case, two (the trial judge and Judge Johnsen) have concluded that coincidence was not a satis-

fying explanation for the similarities in scenes, characters, and incidents. Both plaintiff and defendant charged piracy as a necessary explanation for the similarities; and the majority of the members of the court below concede that a comparison of the similarities "arouses speculation or suspicion" (R. 2043). In fact, a finding of no access, which in this case would necessarily imply that all the similarities (R. 1644-52) were the result of coincidence, would do violence to human reason and experience.

An examination of the majority opinion reveals that it consists of, and is based upon, an appraisal by the court below of the veracity and credibility of witnesses and a weighing of the evidence. Thus the opinion observes, with regard to defendant's producers, directors and writers, that "each individual testified with complete freedom, candor and frankness, without mental reservation. Collectively they are seen in their testimony to have been a hard working group, concentrating their energies upon their task of original composition and production" (R. 2035). The opinion assigns to Irving Berlin a contribution to the script which is not only at variance with that of the trial judge and with plaintiff's contention, but also in conflict with the testimony of defendant's own witnesses (R. 1238, 1245, 1351, 1362, 1385), and which ignores the nature of the similarities complained of by plaintiff (R. 19-57, 1644-52). Having weighed the evidence for themselves, the majority declared that a contrary view—that of the trial judge and Judge Johnsen—was based upon an "error of law."

The failure of the court below to confine its review within the sphere defined by Rule 52 (a) was particularly dangerous in this case. The claim of fraud, made by defendant on motion to reopen and for a new trial, had charged the atmosphere. Defendant-appellant briefed and argued the case on appeal on a statement which inter-

mingled the matter presented only in the form of affidavits in the motion to reopen and for a new trial, with the evidence introduced at the trial. This made it difficult to determine what evidence and what issues had been before the trial court when its opinion was rendered and what material was presented subsequently.

The trial judge had given long and careful consideration to the case. He had witnessed defendant's original insistence at the trial that "there were no similarities" change, after the decision was announced, to a charge of fraud on the motion to reopen and for a new trial. He had heard the oral testimony of unimpeached witnesses who had read plaintiff's manuscript prior to the production of defendant's picture (R. 76, 81). He was peculiarly able to appraise defendant's allegation of fraud as a desperate attempt to obtain a second day in court. This Court's admonition in *U. S. v. Johnson*, 90 L. Ed. 389, 391-92, applies with particular force.

"The trial judge's findings were supported by evidence. He had conducted the original trial and had watched the case against Johnson and the other respondents unfold from day to day. Consequently the trial judge was exceptionally qualified to pass on the affidavits. The record of both the original trial and the proceedings on the motions for a new trial shows clearly that the trial judge gave the numerous elements of the controversy careful and honest consideration. We think that even a casual perusal of this record should have revealed to the Circuit Court of Appeals that here nothing more was involved than an effort to upset a trial court's findings of fact."

It may be that the court below was unconsciously influenced by the charge of fraud. In his dissenting opinion, Judge Johnsen made explicit his feeling "that there is something in the situation that has not been entirely

reached.” The District Court, after a hearing and consideration extending over a period of six months, has found that there was no fraud; and the record seems to us to establish the fact. However, if petitioner requires exoneration on this charge, she now invites, as she did in the court below, the fullest possible exploration of the issue. Serious charges have been made against her character, in the form of ex parte statements of persons she has had no opportunity to cross examine. Judge Johnsen’s suggestion that the case be remanded for trial and findings on the issue of possible fraud seems to us the least to which petitioner is entitled.

Rule 52 (a) of the Rules of Civil Procedure would have no meaning if findings of a trial court, which were in reality findings of fact, based upon substantial evidence, could be termed “errors of law” and reversed accordingly; the administration of justice in the federal courts would be seriously impaired. Petitioner submits that the departure of the court below from the accepted and usual course of judicial review and the serious consequences thereof calls for an exercise of this Court’s power of supervision.

#### CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE  
**SUPREME COURT OF THE UNITED STATES.**

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OCTOBER TERM, 1945.

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No. 1260.

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MARIE COOPER DIECKHAUS,  
Petitioner,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION.

---

**REPLY BRIEF IN SUPPORT OF PETITION  
FOR A WRIT OF CERTIORARI.**

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In the Petition for a Writ of Certiorari, petitioner relied upon the decisions of other courts with which the majority opinion in the court below is in conflict, on the questions of proof of access (Pet. 22-29) and public domain as a defense to the charge of infringement (Pet. 29-31). Petitioner urged that these decisions represented the uniform holding of every court which had passed upon the issues involved and were consistent with the sympathetic attitude manifested by the Missouri courts toward the protection of an author in his common law copyright (Pet. 17,

20, 22); that there were no local, or other, considerations rendering the decisions inapplicable in this case; and that no such considerations were referred to, or relied upon, by the majority of the court below. In ignoring these rulings and in rendering a decision in conflict therewith, whose effect is, in substance, to destroy the protection heretofore afforded by common law copyright, the Court of Appeals failed to apply the Missouri law as required by *Erie R. Co. v. Tompkins* (Pet. 17-21). Moreover, the majority invaded the province of the trier of fact by substituting their own views regarding the credibility of witnesses and the weight of the evidence for those of the trial judge, whose findings were based upon substantial evidence in the record—a procedure which nullified the division of function between trial and appellate courts established by Rule 52 (a) of the Rules of Civil Procedure.

Defendant, in opposing review of the case by this Court, does not take issue with the decisions relied upon by petitioner; does not cite any contrary holdings; and does not challenge petitioner's assertion that her cases represent the uniform decisions and are grounded upon sound reasons of policy. Defendant contends only that this case does not present the questions which petitioner urges were incorrectly decided. Accordingly, this reply brief deals with the issues as thus limited.

### **I. Proof of Access.**

The majority of the court below held that the decree of the trial court for the plaintiff was based upon an "error of law" (*Twentieth Century-Fox Film Corp. v. Dieckhaus*, 153 F. [2d] 893, 900 [C. C. A. 8]; R. 2043). The error referred to was the trial judge's finding of access. This finding was based upon evidence showing the possibility of physical access by the defendant to plaintiff's book plus similarities between the book and defendant's motion picture which, in the words of the trial judge, were "too



numerous and glaring to be the result of coincidence" (54 F. Supp. 425, 431-32; R. 1440-41) and, in those of Judge Johnsen in the court below, "such in number and character that coincidence was not on its face a natural and satisfying explanation for them" (155 F. [2d] 893, 901; 2044-45).

The trial court, in its findings, required more than eight pages of the record to list the similarities, even though the judge noted that they were set forth "very briefly" (R. 1644-52). They consisted of identities of incident—more than seventeen incidents, of basic importance to the development and treatment of the plot—of characters, dramatic situation and locale. Without the similarities of "plot, expressed ideas, dramatic situations, scenes, episodes, incidents, characters, and treatment thereof contained in plaintiff's composition" (R. 1644), the scenario of defendant's motion picture would be reduced below skeleton proportions.

Cogent reasons have led courts to hold that access may be proved by circumstantial evidence, including similarities between the two works of such a character that coincidence is not a satisfying explanation (Pet. 22-29). Several have stated expressly that similarities alone—without other proof—may be sufficient evidence of access. (See Pet. 27-28, 23 f. n.) In this case, as the trial court noted, there was more. In addition to the similarities, the evidence showed that (as stated by Judge Johnsen in the court below) "during the period that defendant's movie script was in process of preparation at its studio, appellee's [plaintiff's] book was in Hollywood, in the hands of a literary agent and critic, whose staff [consisting of eight or nine employees who read manuscripts and wrote and sold stories] had access to it; and another critic to whom the book previously had been submitted and who, accord-

ing to appellee, had suggested that it could be used as a vehicle for Irving Berlin's songs, was then also located in Hollywood''.

In literary property cases, the principles of proof are the same as in other cases. Plaintiff must adduce evidence of access; but such evidence, as in other fields of law, may be direct or circumstantial. Its weight is for the trier of facts to determine, subject to review under the requirements of Rule 52 (a) of the Rules of Civil Procedure. Isolated and dissected, the weight of a particular item of evidence may be relatively slight. Viewed cumulatively and in the aggregate, in the light of human knowledge and experience, the varied segments may possess convincing and persuasive force. In this case, the denials of defendant's witnesses provided evidence which the trial court was required to, and did, consider together with the other evidence presented by the parties (R. 1643). The trial judge was not required to swallow and believe the denials of defendant's writers who had a direct and acute interest, financial as well as professional, in the result. Questions of credibility were for him to determine; and he decided them adversely to the defendant. Another court, shortly before had similarly denied weight to the denials of copying by several of the same witnesses, under similar circumstances. **Stonesifer v. Twentieth Century-Fox Film Corp.**, 140 F. (2d) 579 (C. C. A. 9).

The majority of the court below explicitly declared that, in this case, the trial court could not, as a matter of law, find access proved. Judge Johnsen's exposition of the correct principles of law on the subject of access indicated that this was his understanding of the majority opinion. So construed, the decision is in square conflict with the uniform holdings of other courts, in this country and in England.

## II. Public Domain.

Other courts have uniformly ruled that a defendant who seeks to defend upon the theory of use of sources in the public domain must affirmatively show that the material, alleged to have been pirated, was in fact taken from sources in the public domain rather than from plaintiff's work (Pet. 29-31). It is not enough that such material existed in the public domain, if it was not used. Defendant cites no cases to the contrary; it contends only that the question is not presented.

Defendant states that public domain is of importance in an infringement suit solely because it tends to fortify defendant's denial of access and copying and weakens the force of the inference to be derived from similarities. If this is conceded, the cases are nevertheless applicable. The existence of such sources does not fortify defendant's denial nor weaken the inference of copying, unless defendant actually resorted to such sources. In this case, not only did defendant make no such contention at the trial, but instead vigorously asserted that the story in its entirety was original with it (Pet. 30).

It should be noted that acceptance of defendant's contention regarding the nature of the issue of public domain strengthens petitioner's position herein. If it merely affects the force of the inference from similarities or serves to fortify defendant's denials of copying, then it is subordinate to the issue of access and does not provide an independent basis upon which to rest the decision of the court below. Since, as previously noted, the majority opinion cannot stand on the issue of access, its sole support fails.

### III. Application of Missouri Law.

Petitioner urged that the Court of Appeals failed to apply the Missouri law to the questions which it should control and instead applied legal concepts which no court anywhere had ever adopted (Pet. 17-20). Defendant's contention on this point amounts to an argument that the court below applied Missouri law because it said it did.

Compliance with the mandate of *Erie R. Co. v. Tompkins* is not, of course, attained by lip service alone. Recognition by a court of its duty to apply the state law is normally the first step. But where, as here, performance does not follow the avowal, the rule has, nevertheless, been violated. For a federal court to attempt to impose its own rules of law regarding access and public domain, as destructive as they are novel, upon the law of Missouri can only be regarded as a failure to apply the state law.

### IV. Rule 52 (a) of Rules of Civil Procedure.

How the court below evaded the requirements of Rule 52 (a) of the Rules of Civil Procedure has been indicated in the Petition for the Writ of Certiorari (31-36). Defendant's contention on this point resolves itself into a count of the number of witnesses who presented their testimony verbally during the course of the trial.

To the extent that numbers make a difference, it may be noted that all of the "live" witnesses appeared for petitioner; their testimony supported her claim to authorship of the book several years before defendant produced its motion picture; and the decision of the trial court reflects favorably upon their credibility. However, the division of function between trial and appellate courts established by Rule 52 (a) does not rest upon so uncertain and shifting a basis as a count of the noses of the

witnesses who take the stand as contrasted with those who testify by deposition. The duty of passing upon the credibility and veracity of witnesses is not taken from the trial judge and vested in the appellate tribunal because only four "live" witnesses appear. The sound considerations of policy which confine the scope of review by the appellate tribunal are manifest in a case of this type, where various tactical moves in the course of a proceeding—such as defendant's charge of fraud on the motion to reopen—can best be understood and appraised in their setting by the trial judge who has conducted the trial and watched the case unfold from day to day (Pet. 34-35).

#### **V. The Charge of Fraud.**

It will be recalled that defendant, having lost at the trial in a defense based on the theory that there was no copying and "that there were no similarities", sought the privilege of retrying the case on the theory that there had been copying but that plaintiff, not defendant, was the literary pirate (Pet. 10). Defendant admits that "at the original hearings in December, 1942, and January, 1943, these matters were not pressed upon the District Court" (Defendant's Brief, 12-13), although the evidence on which defendant's ex parte statements were based was available at that time.

Defendant states that, when it first presented the charge of fraud in the motion to reopen, "plaintiff's counsel \* \* \* did not then seek exoneration" (Defendant's Brief, 4). The truth is just the reverse. Plaintiff not only promptly sought exoneration, presenting evidence to meet every specific charge of fraud (R. 1583-1609), but was in fact exonerated by the trial court. After conceding that it did not offer the evidence at the trial, defendant avers that its affidavits were offered "before any judgment was ever entered, and the District Court should not have ignored them" (Defend-

ant's Brief, 13). The record shows that, far from ignoring defendant's contention, the trial judge gave the issue careful and exhaustive consideration not once, but on several occasions. The motion to reopen was argued orally on June 30, 1944, and thereafter briefs were submitted by the parties. The matter was then taken under submission, and the motion overruled on December 29, 1944 (R. 1639). Again, the charge of fraud was considered in connection with defendant's request for findings of fact (R. 1737) and in the motion for a new trial (R. 1656), filed on January 8, 1945. On February 7, 1945, the court heard further arguments; the matters were submitted, the motions being overruled on March 21, 1945 (R. 1995).

### Conclusion.

The questions regarding the application of the rule of *Erie R. Co. v. Tompkins* and the division of function between the trial and appellate tribunals, raised by this case, are of major importance in the administration of justice in the federal courts. The decision of the majority of the court below overturns existing principles of law applicable to statutory, as well as common law, copyright and destroys the protection which the law has heretofore afforded an author in his literary property. The conflict of decisions thus produced has no basis in considerations of a local nature. For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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## APPENDIX.

Several cases referred to in the Petition have now been reported. The citations are set forth herewith for the convenience of the court:

Arnstein v. Cole Porter, 154 F. 2d 464 (C. C. A. 2);  
Dieckhaus v. Twentieth Century-Fox Film Corp., 153  
F. 2d 893 (C. C. A. 8);  
Heim v. Universal Pictures Co., 154 F. 2d 480 (C.  
C. A. 2).

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1945

No. 1

121

MARIE COOPER DIECKHAUS,  
*Plaintiff-Petitioner,*

*against*

TWENTIETH CENTURY-FOX FILM  
CORPORATION,  
*Defendant.*

**DEFENDANT'S BRIEF IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI**

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June 17, 1946.





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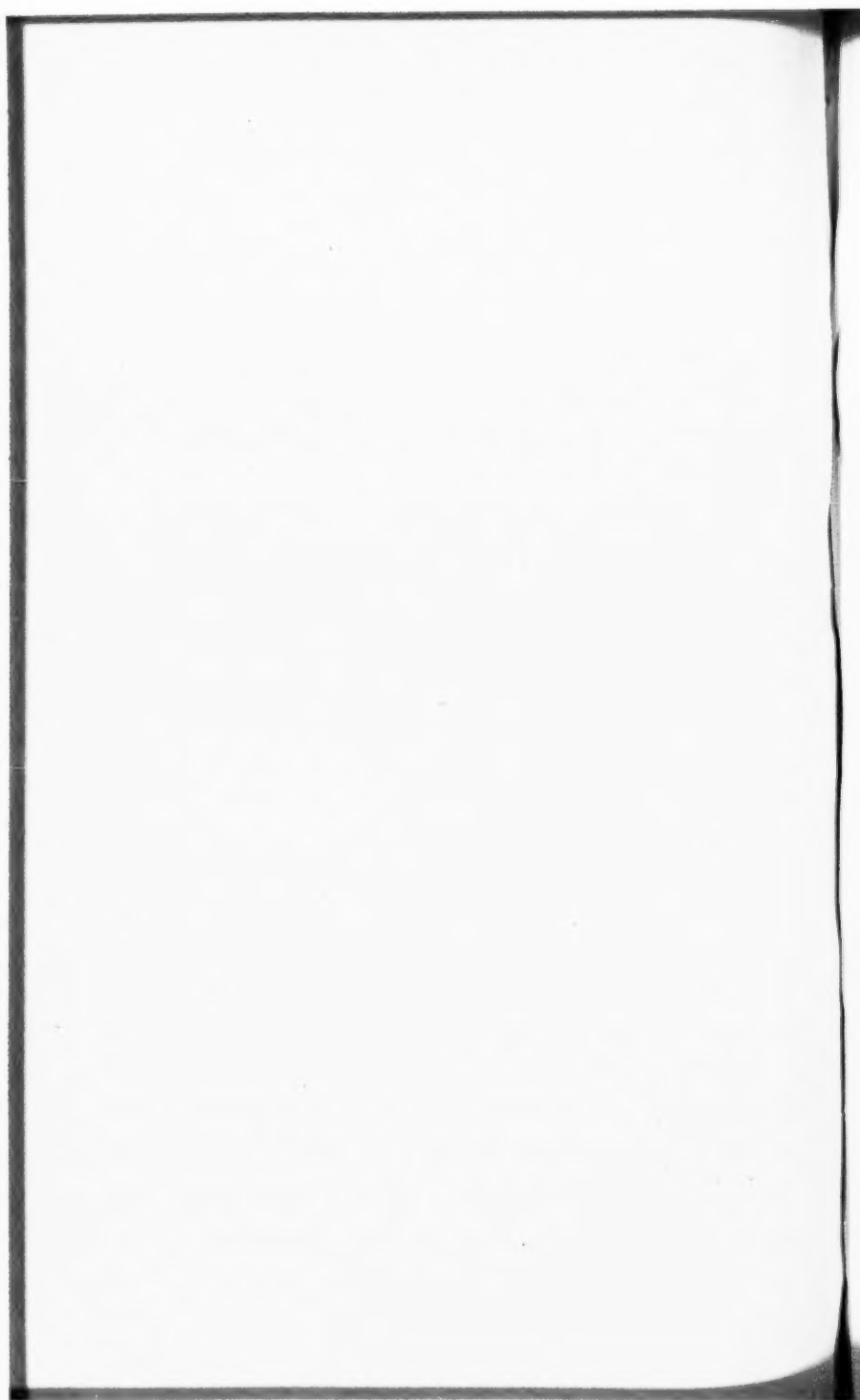
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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1945

No. 1260

MARIE COOPER DIECKHAUS,  
*Plaintiff-Petitioner,*

*against*

TWENTIETH CENTURY-FOX FILM  
CORPORATION,  
*Defendant.*

**DEFENDANT'S BRIEF IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI**

There is no occasion for this Court to exercise its discretionary power to review this private litigation. Jurisdiction in the District Court was solely by reason of diversity of citizenship; no federal statute, no federal question nor any novel question of law is involved.

The plaintiff, a resident of St. Louis, is the alleged authoress of an unpublished manuscript variously entitled "Love Girl", "Twisted Hearts" and the "St. Louis Paganini".

The defendant, a New York corporation, is the producer of the motion picture "Alexander's Ragtime Band" which

starred Alice Faye and Tyrone Power and served as a vehicle for the singing and playing of twenty-eight of Irving Berlin's great songs, including "Alexander's Ragtime Band", "Oh, How I Hate to Get Up in The Morning", "Remember" and "All Alone".

The idea for defendant's motion picture was conceived by its production head, Darryl Zanuck, in the fall of 1936. He talked to Irving Berlin about a picture which would serve as a vehicle for Berlin's songs (R. 385). Berlin agreed, provided the picture be not biographical (R. 386, 398, 421, 423, 1238) and his suggestion was that the picture should tell a story of American jazz music in terms of a band leader (R. 409, 424). Berlin prepared a story outline (Exhibit T) which was completed and typed in October, 1936 (R. 407, 410). That outline is entitled "Alexander's Ragtime Band" and is the story of Alexander and his jazz band. The synopsis of that outline which is incorporated in the opinion of the Circuit Court of Appeals demonstrates that it is the origin and basis of the motion picture.

The Berlin outline was expanded into a treatment prepared by Berlin and Richard Sherman, a well-known writer. They worked for three months and their draft was mimeographed by March 3, 1937. Sheridan Gibney, Lamar Trotti, Kathryn Scola, writers, Harry Joe Brown, the producer, and Henry King, the director, all worked on the script. Darryl Zanuck, the production head, participated in numerous story conferences and contributed much to the dramatic power of the story. Photography began in December of 1937, there was a premiere in Los Angeles in May, 1938, and the picture was first shown in St. Louis in August, 1938.

On May 7, 1941, plaintiff brought this suit charging that defendant copied from her unpublished novel "Love Girl" in making its motion picture.

The origin of plaintiff's novel is obscure. She says she began to write it in 1925 (R. 112, 114, 211). By January of 1934, she had two copies of a manuscript which she sent to Washington under the title "Love Girl". They were returned; the manuscript not being published the claim of copyright could not be registered.

In 1934 plaintiff had Mrs. Mabel Malone, a local writer, read and criticize the manuscript then extant, but this manuscript was not produced at the trial. During the next three years the manuscript was in plaintiff's possession and in St. Louis. There were further revisions and much re-typing.

About January 24, 1937\*, plaintiff sent a typed copy of a manuscript to Mr. Laurence D'Orsay, a literary agent and critic in Los Angeles who had no connection or acquaintance with defendant or any of its employees. He kept it for some time and returned it to her not later than May 8, 1937, with an extensive letter of criticism. What she sent him she apparently thereafter revised extensively. At any rate, what she produced when her deposition was taken in 1941, was in great disarray (R. 62, 148, 149, 170) and contains more than 2500 changes from the original typing (R. 1624).

The trial in December, 1942, and January, 1943, was devoted largely to reading depositions. The District Court announced its opinion in favor of plaintiff in March, 1944.

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\*Three months after Irving Berlin's outline (Ex. T) had been finished.

On June 28, 1944, defendant filed its motion to reopen the proceedings for additional testimony, and presented competent evidence that plaintiff had practiced fraud on the Court and the defendant in her documentary evidence. Plaintiff's counsel resisted the charge and did not then seek reargument. On December 29, 1944, the Court overruled the motion without opinion, and on the same day signed the findings of fact which were prepared by plaintiff's attorney before the motion to reopen had been made. Thereafter, defendant's timely motion for a new trial was denied, its request for findings rejected, and its criticism of the plaintiff's findings ignored.

The Circuit Court of Appeals reversed and rendered judgment dismissing the complaint. Judge Johnson, dissenting, would have reversed the judgment and remanded the case for trial and findings on the issue of fraud. A motion for reargument was denied.

### ARGUMENT

#### **FIRST: THE CIRCUIT COURT OF APPEALS CORRECTLY APPLIED THE MISSOURI LAW.**

Jurisdiction being based solely on diversity, the plaintiff's manuscript being unpublished, the Missouri law applied. There being no authoritative statement of that Missouri law, the Court quite correctly determined from its own research what it anticipated the Supreme Court of Missouri would do in a like case.

In defendant's brief in the Circuit Court of Appeals, it stated (p. 39):

"Since jurisdiction in this case is dependent solely on diversity of citizenship, it being explicit

that plaintiff has no claim under the Copyright Laws of the United States, the District Court should have determined and applied the Missouri law.

\* \* \*

"We assume that if the Supreme Court of Missouri were faced with this record it would select from the vast bibliography available the most cogent, well reasoned and convincing authorities as its guide in formulating the Missouri law."

This is exactly what the Circuit Court of Appeals did, saying [R. 2037]:

"Although this action is brought in Missouri under the laws of that state and not for infringement of federal copyright, the law to be applied to it is found in the very numerous federal decisions which have fully expounded the origins, principles and philosophy governing the ascertainment, definition and protection of the right of property in literary productions, and there is nothing in any Missouri decision in conflict therewith. The District court relied upon them. More than two hundred of the decisions have been brought to our attention by the diligence of able counsel and we have considered them."

The Circuit Court did not, as is now charged, ignore the uniform holdings of other courts in formulating its decision.

In *Ruhlin v. N. Y. Life Ins. Co.*, 304 U. S. 202 (1938), this Court indicated that it would not ordinarily grant certiorari to review a decision of a Circuit Court of Appeals on general state law.



**SECOND: THE CIRCUIT COURT OF APPEALS CORRECTLY DETERMINED THE ISSUE OF ACCESS.**

There was no testimony by anyone that any employee of the defendant had ever seen or read or copied from plaintiff's manuscript. Everyone connected with the production of the motion picture testified that he never saw or read plaintiff's manuscript and did not copy therefrom.

The unsupported suggestion that defendant might have had access through Mrs. Malone, who had some manuscript of plaintiffs for a few days in 1934, is simply fantastic. Mrs. Malone categorically denied telling anyone at Twentieth Century-Fox anything about the novel. She knew no one at Twentieth Century-Fox. No one at Twentieth Century-Fox knew Mrs. Malone. The plaintiff's gratuitous suggestion that Mrs. Malone testified falsely is not proof of access.

Mr. D'Orsay, plaintiff's literary agent, testified categorically he knew no one at Twentieth Century-Fox and had never disclosed the contents of plaintiff's manuscript to anyone at Twentieth Century-Fox (R. 342-344, 347, 353). No one at Twentieth Century-Fox knew Mr. D'Orsay or learned anything about the plaintiff's manuscript from him (R. 385, 406, 1218, 1236, 1250, 1268, 1312, 1356, 1383). Again, speculation that Mr. D'Orsay lied or that one of his employees could have copied the manuscript and given it to some unidentified person at Twentieth Century-Fox is not proof of access. Not even the District Court placed any reliance upon the "possibility" of access through these facts (R. 1431-1432):

"The foregoing facts prove no more than that the manuscript was temporarily out of plaintiff's control and was in Hollywood, the same city in

which defendant's employees carried on their endeavors. We certainly cannot infer from this alone that defendant's employees had access to plaintiff's novel for the purpose of copying."

In the light of this record, the Circuit Court of Appeals held (R. 2036-2038):

"The oral and documentary evidence in the record therefore establishes the fact that the defendant had no access to plaintiff's book, unless the law of plagiarism permits the court to draw an inference contrary to such proof from its finding of similarities on comparison of the book with the picture.

\* \* \* \*

"But we are equally convinced that the law of plagiarism has never been declared to sanction a determination of access upon a finding of mere similarities like those here involved in the face of such probative evidence of independent origination and of non access as appears in this record. There is no question here of comparison disclosing any co-existing identities of substantial originated matter in the book 'Love Girl' and the musical production 'Alexander's Ragtime Band'. The book is laid in part in the same period as the picture but it is about the loves of the love girl and her several lovers and there is no note of music in it. The picture's real interest and value as to every scene and action in it are in the music."

This case does not present the question which plaintiff urges was incorrectly decided,—Whether the fact of access may be proved by circumstantial evidence, including inferences from unexplained similarities, in face of direct evidence to the contrary by the defendant.

The plaintiff refers this Court to decisions in other Circuits where identities in musical phrases or striking similarities in expression have been said to have probative force on the issue of access. The alleged similarities here are trivial and, under the doctrine announced in the authorities cited by plaintiff, they have no probative value at all in law. The Circuit Court said (R. 2040-2041):

"A number of plagiarism cases that have turned in the accuser's favor upon the comparison between the accused and the accuser's composition have been cases where there was access and where the identities or very great similarities were in original copyrighted matter of substantial importance in the accuser's work which we find lacking here, and even in those cases we find none analogous to the situation here where the fact of non access has been established by evidence of witnesses and documents which exclude all reasonable probability of access and leave only the bare possibility that all the witnesses intentionally swore falsely upon the matter of access of which they had full knowledge.

"After all the long study of the plagiarism cases we must come back to recognition that the question in this case is simply whether the circumstantial evidence of the comparison from which one fair reader may draw one inference and another fair reader another, and neither can do more than speculate or suspect, can be held to sustain the plaintiff's burden to prove access and copying against the direct evidence of credible unimpeached witnesses and unquestioned documents that there was no access."

Here, there simply is no evidence at all, direct or circumstantial, that anyone in the defendant's employ ever saw, much less copied from, plaintiff's manuscript. We

believe on this record the Supreme Court of Missouri would have so held and that the Circuit Court properly so held.

**THIRD: THE CIRCUIT COURT OF APPEALS DID NOT MISINTERPRET THE MISSOURI OR GENERAL LAW AS TO MATTERS IN THE PUBLIC DOMAIN BEING A DEFENSE TO PLAGIARISM.**

The third question, which plaintiff suggests is presented here, is thus stated (Petition, p. 4):

"3. Whether, in a suit for common law copyright infringement, public domain constitutes a defense to the charge of literary piracy, if defendant fails to establish that the subject matter involved was taken from sources in the public domain and not from plaintiff's work."

No such question is presented.

As we understand it, if one resorts to matters in the public domain and writes an original arrangement or expression of matters there found, he becomes an author and has a property right in his original arrangement or expression.\* Another may go to same matters in the public domain and even if by chance he writes the same arrangement or expression, he, too, is an author. But the second may not copy the first's arrangement or expression. The Circuit Court of Appeals held nothing to the contrary.

In considering whether the so-called "similarities" were so striking as to have probative value on the issue of copy-

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\*The Missouri Court has phrased it that the creator of a *unique intellectual* production will be protected from unauthorized appropriation or conversion. *Kurfiss v. Cowherd*, 233 Mo. App. 397 (1938); *Brunner v. Stix, Baer & Fuller Co.*, 352 Mo. 1225 (1944).

ing, the Circuit Court noted that the "similarities" related to stock and commonplace matters in the public domain. It is well-settled that this fact is material to the issue of copying, since it serves to fortify the defendant's denial of access and copying. *Darrell v. Joe Morris Music Co.*, 113 F. (2d) 80 (C. C. A. 2nd, 1940).

For example, there is the old prohibition "gag" about a bootlegger concealing bottles of liquor in a baby carriage. No rational mind is forced to the inevitable conclusion that the only place defendant could have secured that idea was from plaintiff's unpublished manuscript. If others have written of the same matters without copying from the plaintiff, there is no reason to infer that the defendant copied such material from the plaintiff.

**FOURTH: THERE WAS NO FAILURE BY THE CIRCUIT COURT OF APPEALS TO COMPLY WITH RULE 52.**

In this case, neither the plaintiff nor any of the defendant's witnesses testified in open court. No witness testified in person at the trial on the issues of access or copying.

Only four "live" witnesses were called by plaintiff. One Dr. Wieman, a dentist, testified he had read a manuscript of the plaintiff in 1934 and 1936, and that Exhibit 1 told the same story as that which he had read five years before, but he could not and would not say it was the particular manuscript he had read five years before (R. 78-80). Mr. Phillips, a local publisher, testified he had read and marked for printing Exhibit 1—after it came back from California—and was explicit that when he saw it, it was a clean copy (R. 87) and not as it was when produced at the trial. Hubert Bauersachs testified he was plaintiff's friend and that he had told her some incidents of his life as a concert

violinist. Significantly, he said he had never read the manuscript (R. 88). The fourth witness, Gissler, only testified to the acknowledgment of the affidavit accompanying the plaintiff's manuscript when something was sent to the Library of Congress in 1934. He never read it (R. 93).

All the rest of the testimony was by deposition and documentary exhibits. On the main issues, there was no assessing by the District Court of the credibility of witnesses and acceptance or rejection of their testimony from their demeanor at the trial. The ultimate question of whether the defendant's motion picture is a pictorial representation of the plaintiff's novel and the question of whether the defendant copied the plaintiff's mode of expression are questions for the reviewing Court. *U. S. Fidelity Co. v. Bray*, 225 U. S. 205 (1911).

Certainly no court would consider itself bound by such findings of the District Court as the one that the defendant copied the idea of an Army Show and the singing of "Oh, How I Hate to Get Up in the Morning" from the plaintiff's unpublished novel, rather than from the famous Berlin show of World War I.

#### **FIFTH: THE PLAINTIFF FRAUDULENTLY IMPOSED UPON THE DISTRICT COURT AND THE DEFENDANT.**

In its motion to reopen the case, filed after the announcement of the District Court's opinion but before the entry of judgment, and in its motion for a new trial, the defendant cogently demonstrated that fraud had been practiced on the Court and the defendant.

(a) Exhibit 1, the manuscript said to have been copied from by defendant, was not the same as sent to Mr. D'Orsay in 1937 (R. 377, 1532, 1534). It con-

tains thousands of changes and alterations (R. 1624). When produced it was in great disarray and its present form is due to the industry of counsel. Some of it was typed and many changes in it were made after plaintiff saw defendant's motion picture in St. Louis in August, 1938 (R. 63, 143, 1624).

(b) Exhibit 1A, the Government application form and affidavit for registration of claim of copyright used by plaintiff in 1934 had been altered by erasure and addition.

(c) Exhibit 2, the Government rejection slip sent plaintiff by the Library of Congress has been erased by a chemical and a new title inserted.

(d) Exhibit 4, the note inclosed with the sealed copy is apocryphal. It could not have been written on the date it bears.

(e) Exhibit 5, the copy said to have been sealed from January 21, 1937, to June, 1941, contains alterations which conclusively demonstrate that whatever was in the "sealed" package, it was removed and this document inserted. At least 45 pages are on heavier and different paper from the rest of the volume. No one of these pages was typed consecutively after the page which precedes it or immediately prior to the page which follows it.

(f) The wrapper enclosing the sealed copy was destroyed or lost in plaintiff's attorney's office (R. 1418, 1627, 1892).

It is true that at the original hearings in December, 1942, and January, 1943, these matters were not pressed

upon the District Court. But they were before any judgment was ever entered, and the District Court should not have ignored them. *Hazel-Atlas Co. v. Hartford Co.*, 322 U. S. 238 (1944); *Precision Co. v. Automotive Co.*, 324 U. S. 806 (1945). The decision of the Circuit Court of Appeals dismissing the complaint made it unnecessary for it to consider these matters.

### CONCLUSION

This is simply a litigation between two citizens. No important question of law has been wrongly decided. There is no conflict of decisions between Circuit Courts. The Circuit Court of Appeals has correctly predicted and applied the Missouri law on every issue. The writ prayed should be denied.

Respectfully submitted.

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